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The Right to Travel: In Search of a Constitutional Source

Duane W. Schroeder

University of Nebraska College of Law, duanes43@yahoo.com

Comment

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I. INTRODUCTION

The notions embodied in the right to travel, the freedom of movement and freedom to settle in a place of one's own choosing without governmental interference, have long been recognized and protected in the United States. This is particularly true of the right to travel which was specifically protected by the Articles of Confederation;[1] however, when the Constitution replaced the Articles of Confederation, it contained no reference to this right of travel. It is clear that the framers of the Constitution did not intend to eliminate freedom of travel as a protected right since permitting states to erect barriers at their borders which would prevent the free movement of the population is clearly inconsistent with the theme of national unity which runs through the Constitution.

Consequently, the Supreme Court has generally agreed that there is a right to travel but there has been no consensus concerning the constitutional source of this right. At various times, the privileges and immunities clauses, the due process clause of the fifth amendment, and the commerce clause have all been considered as potential sources of the right of interstate travel. More recently, the search for a particular provision in the Constitution as a foundation for the right of travel has been abandoned in favor of the assertion that it exists somewhere in the Constitution.

II. TRADITIONAL CONSTITUTIONAL SOURCES

A. Privileges and Immunities Of State and National Citizenship

In *Corfield v. Coryell*,[2] the first court to discuss the right to

1. "The free inhabitants of each of these states . . . shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have *free ingress and regress to and from any other state*. . . ." (emphasis added). ARTICLES OF CONFEDERATION, Article IV.
2. 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

travel held that New Jersey could prohibit non-residents from raking oysters in New Jersey waters because the oyster beds belonged to New Jersey. However, the court observed in dictum that the privileges and immunities of state citizenship clause of Article IV section 2 of the Constitution would prevent New Jersey from prohibiting interstate travel itself. The right to travel interstate was thus considered an incident of state citizenship.

Even at this early date the right to travel was held to include more than the right to pass through a state. It clearly embraced the right to move into a state and live there.[3]

The *Corfield* theory was followed in a number of early cases.[4] It later lost favor with the Court as a source of the right to travel and fell into disuse. A major shortcoming of looking to Article IV section 2 for the right to travel is that the clause protects only against a state's discrimination in favor of its own citizens.[5]

After the adoption of the fourteenth amendment, the Constitution guaranteed the privileges and immunities of national citizenship.[6] In the *Slaughter House Cases*,[7] the Supreme Court indicated that the right of interstate travel was a privilege of national citizenship. Interestingly, the Court cited two earlier cases for support, *Crandall v. Nevada*[8] and the dissent in the *Passenger* cases,[9] both of which were decided before the ratification of the fourteenth amendment.

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3. The right of a citizen of one state to pass through or to reside in any other, for purpose of trade, agriculture, professional pursuits, or otherwise . . . may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.

   Id. at 552.

4. *See* United States v. Wheeler, 254 U.S. 281, 298-99 (1920); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).

5. The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) contain the following explanation of the reach of the privileges and immunities of state citizenship.

   Its sole purpose was to declare to the several states, that whatever those rights, as you granted or established them to your own citizens, or as you limit or qualify, or impose restraints on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

   Id. at 77. *See also* Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

6. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

7. 83 U.S. (16 Wall.) 36 (1873).

8. 73 U.S. (6 Wall.) 35 (1867).

9. 48 U.S. (7 How.) 283 (1849).

Crandall involved a tax Nevada had levied against all people leaving the state by common carrier. The Court refused to base its holding that the tax was unconstitutional solely on the commerce clause. It went on to find the tax to be an unconstitutional infringement of the right to travel which was protected as an incident of national citizenship.[10]

The *Slaughter House* Court also relied on Chief Justice Taney's dissent in the *Passenger Cases* for support of its position that the fourteenth amendment privileges and immunities clause protected the right to travel. Taney had said:

> For all the greater purposes for which the Federal Government was formed we are one people with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interception as freely as in our own state.[11]

After the *Slaughter House Cases*, the privileges and immunities of national citizenship seemed to become a dead letter. The last significant attempt to put some life into the clause occurred in 1941 in the case of *Edwards v. California*.[12] California had imposed severe restrictions on the migration of indigents into the state. The majority held that the restrictions were an unconstitutional restraint of interstate commerce. Justices Douglas and Jackson, joined by Black and Murphy, refused to follow the majority's lead. Instead, they reasoned that the right to move from state to state was associated with national citizenship and was thus protected by the privileges and immunities clause of the fourteenth amendment.[13] Relying on this, however, would mean that aliens would not be protected in this right.

Since *Edwards* there has not been a significant attempt to use the fourteenth amendment privileges and immunities clause as a source of the right to travel. This factor alone would be enough to induce one to look elsewhere for a constitutional source. In addition, relying on the fourteenth amendment implies that between 1789, when the Constitution replaced the Articles of Confederation, which had guaranteed the right to travel, and 1868, when the fourteenth amendment was adopted, there was no right to travel.[14]

10. 73 U.S. at 43.
11. 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting).
12. 314 U.S. 160 (1941).
13. *Id.* at 178, 182.
14. When the break with England occurred, the Americans considered the right of travel important enough to be included in the Articles of Confederation. *See* note 1 *supra*. The Constitution's privileges and immunities and commerce clauses incorporated all the provisions of Article IV of the Articles of Confederation except the right of travel pro-

Such an omission surely was not the intention of the framers of the Constitution and is also inconsistent with the dicta of *Corfield* and the dissent of the *Passenger Cases.*

B. Commerce Clause

Like the two privileges and immunities clauses, the commerce clause of Article I section 8 has had its supporters as the constitutional source of the right to travel. In the *Passenger Cases,*[15] the first right to travel case considered by the Supreme Court, the majority of the Court seemed to agree that the right to travel was protected by the commerce clause.

The most famous case utilizing the commerce clause as a source for the right to travel was *Edwards v. California.*[16] California had made it a misdemeanor for any person knowingly to bring a nonresident indigent into the state. The Court held that this was an unconstitutional burden on interstate commerce.[17]

The commerce clause appears to have some current validity as a constitutional source of the right to travel, because as recently as 1966 the Court said it was well settled that "the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce."[18]

As with the privileges and immunities clauses, the commerce clause has its limitations, the most significant being that it acts only as a restraint against the states. It is an extensive grant to Congress of power to regulate.[19] Another major objection to relying on this clause was expressed by Justice Jackson in his concurring opinion in *Edwards.*

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vision. This omission can be explained in only two ways. Either the framers left out the right of travel because they saw it as being undesirable, which is unlikely, or they left it out because they considered the right to be embodied in other provisions of the Constitution.

15. 48 U.S. (7 How.) 283 (1849). The Court overruled a New York law which required the master of every vessel arriving in New York to report the name, age, and last legal settlement of every person aboard. It held that this was not an exercise of the police powers but rather regulation of interstate commerce. *See also* United States v. Wheeler, 254 U.S. 281 (1920).
16. 314 U.S. 160 (1941).
17. *Id.* at 174.
18. United States v. Guest, 383 U.S. 745 (1966). The case involved a conspiracy to deprive blacks of their constitutional rights, including the right to use the highways. The Court did not identify a source of the right to travel but held that Congress had the *power* under the commerce clause to *protect* the right of travel.
19. Hammer v. Dagenhart, 247 U.S. 251 (1918).

> [T]he migrations of human beings . . . do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the Commerce Clause is likely to result either in distorting commercial law or in denaturing human rights.[20]

C. Due Process Clause

Thus far the due process clause of the fifth amendment has been utilized as a source of a right to travel only in cases of foreign travel. In the first of these, *Kent v. Dulles*,[21] the Court found a right to travel abroad in the due process clause.[22]

In *Kent*, although the Court held that regulations adopted by the Secretary of State denying passports to Communists were invalid, it did not rule on the constitutionality of such regulations, but rather held that the regulations were congressionally unauthorized.

Aptheker v. Secretary of State[23] answered the question left open by *Kent*. The Court overturned a federal statute which made it a felony for a Communist to apply for, use or attempt to use a passport. The statute was held to be unconstitutional on its face because it was too broad and invaded the right to travel protected by the due process clause.[24]

A limitation to the *Kent* and *Aptheker* approach to the right of travel was suggested by *Zemel v. Rusk*.[25] In that case, a regulation prohibiting issuance of passports to Cuba was upheld with the Court saying that even though the right to travel abroad was protected by due process, it remained subject to reasonable regulation.

As will be shown, such a limitation on the right of interstate travel would probably be considered void; therefore, due process may represent too weak a protection for the right to travel[26] since the right will always be subject to reasonable regulation, if based on a due process argument.

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20. 314 U.S. at 182.
21. 357 U.S. 116 (1958). "The right to travel is a part of 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125.
22. No person shall "be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V.
23. 378 U.S. 500 (1964).
24. *Id.* at 508.
25. 381 U.S. 1 (1965).
26. *Zemel* also suggested that the right of foreign travel might be more limited than interstate travel. *See* Note, *The Right to Travel—Quest for a Constitutional Source*, 6 RUTGERS-CAMDEN L.J. 122, 129 (1974).

D. The Current Approach

In the more recent cases, the Court seems to have given up any notion that the right to travel can be located in any single part of the Constitution. Instead, it cites the old cases and may add a sentence indicating that the nature of the federal union requires a right of interstate travel.[27] An excellent statement illustrating this idea is found in *United States v. Guest.*[28]

> Although the Articles of Confederation provided that 'the people of each state shall have egress and regress to and from any other state,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementry was conceived from the beginning to be a necessary concomitant of the stronger *Union* the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a *basic* right under the Constitution. . . . Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.[29]

III. EQUAL PROTECTION: SEARCHING FOR A TEST

Recently, the right to travel has become entangled with the equal protection clause. Generally, the cases decided under this clause have involved a durational residency requirement which was a prerequisite to engaging in a certain activity or to receiving certain benefits in a state. Thus, there is a classification based on an individual's having exercised his right of interstate travel.

Whenever equal protection is in issue, there must be a two-tier approach to the problem. The first step is to apply the rational relationship test. Under this test, reasonableness of a classification determines whether the equal protection clause has been violated, with the party challenging the classification having the burden of proving that the classification is unreasonable. In its analysis, the Court gives great weight to the legislature's determination of what

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27. It has been suggested that:
> [t]he common thread running through all opinions and discussions on the right to travel is the belief that the right is inherent in the concept of the Federal Union. While this concept may be implicit in the commerce clause and the privileges and immunities clauses, no specific clause in the Constitution created the Federal Union.

Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989, 999 (1969). *See also* Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 137-39 (1970).

28. 383 U.S. 745 (1966).

29. *Id.* at 758-59 (footnotes omitted) (emphasis added).

is reasonable.[30] If the classification is based upon a suspect classification or infringes upon a fundamental right, the strict scrutiny test, rather than the rational relationship test, is employed. The classification is considered to be invalid unless the state can show that this classification is *necessary* to promote a *compelling* state interest.[31]

It is clear that the right of interstate travel is a fundamental right;[32] therefore, it would seem that any durational residency requirement would trigger the strict scrutiny test and that the durational residency provision would be held to be void. Such, however, has not been the case. In spite of agreement that the right of interstate travel is fundamental, the Supreme Court's approach to the durational residency requirements and hence to the equal protection aspect of the right to travel cases has been unclear.

In *Shapiro v. Thompson*,[33] the Court employed the strict scrutiny test and held that denying welfare benefits to persons who had not met a one year state residency requirement was an unconstitutional penalty imposed on individuals who had exercised the fundamental right of interstate travel.

The Court added a confusing footnote which left the status of durational residency requirements in other situations in doubt.

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition free education, to obtain a license to practice a profession, to hunt or fish and so forth. Such requirements may promote compelling state interests. . . . [or] may not be penalities upon the exercise of the constitutional right of interstate travel.[34]

This statement that some residency restrictions might not be penalties, when read in conjunction with the fact that in this case there was evidence of a state intention to deter migration, created considerable confusion in the lower courts concerning the extent of the Court's holding. Some courts held the strict scrutiny test applicable to other residency requirements,[35] while other courts applied

30. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
31. Shapiro v. Thompson, 394 U.S. 618 (1969).
32. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).
33. 394 U.S. 618 (1969).
34. *Id.* at 638 n.21. Footnote 21 seemed to make possible classifications affecting a fundamental right which would be measured by the rational relationship test.
35. *See, e.g.*, Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (public housing); Keppel v. Donovan, 326 F. Supp. 15 (D. Minn. 1970), *aff'd*, 405 U.S. 1034 (1972) (voting); Kohn v. Davis, 320 F. Supp. 246

the rational relationship test.[36]

In 1972, the majority of the Court seemed to bring the correct test into focus in *Dunn v. Blumstein.*[37] In that case, it held unconstitutional a Tennessee statute which required one year state and three months' county residency as a prerequisite to voting. Tennessee attempted to distinguish *Shapiro* by showing that in passing its statute there was no state intent to deter migration into the state and that regardless of the state's intent, the residency requirement did not act as an effective deterrent to interstate travel. The Court in stating that Tennessee was mistaken in its argument explained what *Shapiro* had meant: "In Shapiro we explicitly stated that the compelling-state interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel]. . . .' "[38]

Since durational residency requirements would always seem to be a penalty on exercising the right of interstate travel, it appeared that after *Dunn* all such requirements might have to be measured by the strict scrutiny test and hence be held invalid. The Court soon dispelled this belief by summarily affirming two district court decisions which upheld durational residency requirements.[39]

In the latest right of travel case to apply the strict scrutiny test, *Memorial Hospital v. Maricopa County,*[40] the Court clarified its

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(D. Vt. 1970), *aff'd mem.*, 405 U.S. 1034 (1972) (voting); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (bar admission); King v. New Rochelle Municipal Housing Authority, 314 F. Supp. 427 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (public housing).

36. *See, e.g.*, Spatt v. New York, 361 F. Supp. 1048 (E.D.N.Y. 1973), *aff'd mem.*, 414 U.S. 1058 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).
37. 405 U.S. 330 (1972).
38. *Id.* at 340.
39. Sturgis v. Washington, 368 F. Supp. 38 (W.D. Wash. 1973) *aff'd mem.*, 414 U.S. 1057 (1973) (one year durational residency requirement for receiving in-state tuition rates); Vlandis v. Kline, 414 U.S. 441 (1973) (the doctrine of irrebuttable presumptions was used to overturn a statute which denied residence to a student for tuition purposes). *See* 8 U. RICH. L. REV. 311 (1974); Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd mem. sub nom.*, Rose v. Bondurant, 409 U.S. 1020 (1972) (six months' residence before admission to bar). Residency requirements of more than six months have been held unreasonable. *See* Lippman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).
40. 415 U.S. 250 (1974).

position on when the strict scrutiny rather than the rational relationship test would be employed. The case involved an indigent suffering from respiratory disease who had recently moved into Arizona. He suffered an attack which required hospitalization. Under Arizona law, the county government had the duty of providing necessary hospital and medical care for indigents only if they had been residents of the county for one year. Since the appellant had recently arrived from another state, he was ineligible for receiving medical care from the county.

The Supreme Court held the statute unconstitutional. The majority opinion indicated that neither an intent to deter travel nor actual deterrence was necessary in order to trigger the strict scrutiny test.[41] Under the traditional two-tier approach to equal protection, the nature of the infringement of a fundamental right is not considered. It is only necessary to determine if a fundamental right is involved. If it is and that right is restricted, the strict scrutiny test is employed. In *Maricopa County*, the Court seemed to have modified the test by holding that the strict scrutiny test was triggered because medical care was a basic necessity of life. The Court also stated that this test had been applied in *Shapiro* because the residency requirement denied welfare assistance, one of the basic necessities of life, and in *Dunn* because there was a denial of the franchise, a fundamental political right.[42]

Maricopa County can be considered as representing a new approach in the right of travel cases to the two-tier system of applying the equal protection test. It appeared that the Court would not apply the strict scrutiny test until exercising the right to travel would deprive an individual of a given interest which could be called a necessity. After *Maricopa County* the problem seemed to be one of deciding what interests were so important that depriving an individual of them would infringe on the right of interstate travel and trigger the strict scrutiny test.

If *Maricopa County* seemed to bring order to this confused corner of equal protection, this was an illusion. Within one year after it was decided, the Court again modified the test to be employed.

Sosna v. Iowa[43] was the first case holding a durational residency requirement constitutional. In it the Court upheld the constitutionality of Iowa's one year durational residency requirement for obtaining a divorce.

41. *Id.* at 257-58.
42. *Id.* at 259.
43. 419 U.S. 393 (1975).

Sosna represents a marked departure from even the modified *Maricopa County* two-tier approach to equal protection. Although the appellant challenged Iowa's one year residency requirement as a penalty on the fundamental right to travel, the Court did not even discuss the issue of whether the residency requirement for obtaining a divorce was onerous enough to be a "penalty" on the right to travel and hence trigger the compelling state interest test. Rather, the Court held that: "Iowa's residency requirement may *reasonably* be justified on grounds other than purely budgetary considerations or administrative convenience."[44]

The Court did not mention the deprivation of necessities which, after *Maricopa County*, seemed to have been the key to the constitutionality of durational residency requirements.[45] Instead, it stated that the *Shapiro* line of cases had been decided by using the balancing test.

> What those cases [i.e. *Shapiro* to *Maricopa*] had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or record-keeping considerations which were held insufficient to *outweigh* the constitutional claims of the individuals.[46]

Marshall's dissenting opinion stated that the Court was departing sharply from "the course . . . followed in . . . durational residency requirements since *Shapiro*."[47]

> In its stead, the Court has employed what appears to be an *ad hoc balancing test*, under which the state's putative interest in ensuring that its divorce plaintiff established some roots in Iowa is said to justify the one-year residency requirement.[48]

The seeds of the balancing test enunciated by *Sosna* were already present in *Shapiro* when the Court said: "The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union."[49]

In order to comply with this position, it is necessary to adopt a balancing test. But, to do so is not without problems. If the right to travel is somehow connected with the federalist system, it is important to remember that the concept of federalism embraces both limited state autonomy and national unity.[50] If the traditional equal protection test or the strict scrutiny test were applied,

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44. *Id.* at 406 (emphasis added).
45. *Id.*
46. *Id.* (emphasis added).
47. *Id.* at 418.
48. *Id.* (emphasis added).
49. Shapiro v. Thompson, 394 U.S. 618, 630 (1969).
50. THE FEDERALIST No. 51 (J. Madison).

it could be argued that one or the other of these federalist values must be sacrificed without proper consideration. For this reason, if residency requirements which serve to protect the states' interest in autonomy are upheld, the nation which has an interest in free movement of the population suffers. If the traditional rational relationship test were applied, the national interest would almost always be sacrificed to the national interest in free travel. If a strict scrutiny test were to be employed, the state's interest in autonomy would almost always be sacrificed to the national and local interests in the right of travel cases. This tension between the local interest in autonomy probably explains the Court's dissatisfaction with the traditional two-tier approach and the resulting confusion in the cases after *Shapiro*.

If *Sosna* does indeed stand for using a balancing test, the commerce clause cases provide the best guidance on how the test will be applied, since commerce is another area in which federalism is involved and adjustments between the national and the local interests are required. In regard to the commerce clause the Court has defined those situations in which the national interest may give way to the local interest.

> When the regulation of matters of local concern is local in character and effect, and its impact on the *national commerce* does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.[51]

If "right of interstate travel" were substituted for "national commerce," the above test would be applicable to the right of travel case.

In summary, it appears that the Court has finally found a satisfactory equal protection test for the right to travel cases. Earlier attempts to formulate a test were unsatisfactory because they did not give enough weight to federalist values. Thus, the Court moved from *Dunn* which suggested that all durational residency requirements were void to *Sosna* which calls for a balancing of the state and national interests in making such a determination.

IV. RIGHT OF INTRASTATE TRAVEL?

Examination of statutes placing limitations on intrastate travel helps to define the limits of the *Shapiro* line of cases. In *United States v. Wheeler*,[52] the Supreme Court expressed the opinion in dicta that there is a fundamental right of intrastate travel.

51. Southern Pac. v. Arizona, 325 U.S. 761, 767 (1945) (emphasis added).
52. 254 U.S. 281 (1920).

> In all of the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the *fundamental* right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to *move at will* from place *therein*, and to have free ingress thereto and egress therefrom.[53]

If a fundamental right of intrastate travel were to exist, application of the strict scrutiny test would probably invalidate many restrictions on the right to travel. However, if a fundamental right is not involved, the traditional, easily satisfied, equal protection test is employed. The Court has subsequently denied the continuing validity of this dicta.[54]

Even if the equal protection clause does not apply, the due process clause forbids denial of a fundamental right absent a showing of a substantial countervailing state interest.[55] If the right of intrastate travel is not fundamental, the due process clause requires no more than a showing that the legislature or political subdivision has a reasonable basis for its decision.[56] This is a much easier test to satisfy and is comparable to the traditional equal protection standard. Regardless of whether the equal protection or due process test is applied, it is clear that if the right of intrastate travel is considered to be a fundamental right, the state will have a very difficult burden in justifying any restriction upon it.

Although law review articles[57] and lower court cases[58] have

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53. *Id.* at 293 (emphasis added).
54. "Whatever continuing validity *Wheeler* may have as restricted to its own facts, the dicta . . . have been discredited in subsequent decisions." United States v. Guest, 383 U.S. 745, 759 n.16 (1966).
55. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 240 (1970); Note, *Due Process Clause—Access to Divorce Courts for Indigents*, 46 TUL. L. REV. 799, 804 (1972).
56. *See* Section II C *supra*.
57. Comment, *Intrastate Residence Requirements for Welfare and the Right to Intrastate Travel*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 591 (1973); Comment, *Residency Requirements for Municipal Employees, Denial of a Right to Commute?* 7 U. SAN FRANCISCO L. REV. 508 (1973).
58. Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972). A requirement that policemen and firemen live in the community they serve was held an unconstitutional restriction on the fundamental right of intrastate travel. "It would be meaningless to describe the right to travel between the states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *Id.* at 498. *See also* King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971);

considered the right of intrastate travel to be fundamental, other courts[59] and the Supreme Court itself[60] have indicated that there is *no* fundamental right of intrastate travel.

In *Detroit Police Officers Association v. City of Detroit,*[61] the Michigan Supreme Court applied the rational relationship test and held that an ordinance which required policemen who worked in Detroit to live in Detroit bore a reasonable relationship to the object of the legislation,[62] and hence was valid. On appeal, the United States Supreme Court dismissed the case for want of a substantial federal questions,[63] even though the appellant's brief asserted that ". . . the right to live where a citizen chooses is a *fundamental* personal liberty that cannot be abridged by a mere showing that a residency ordinance may be reasonably related to a proper city purpose."[64] The implications of this are that intrastate travel is not a fundamental right, and that statutes limiting such travel will be upheld, providing there is a reasonable basis for the legislature's decision to impose such a limitation.

A. Continuous Residency

In *Ector v. City of Torrance,*[65] a case involving a librarian who lost his job because he did not reside in the city where he worked,

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Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (municipal ordinance requiring two years' city residence before admission to public housing held invalid); Donnelly v. City of Manchester, 111 N.H. 50, 274 A.2d 789 (1971) (ordinance requiring city school teacher to reside in city held invalid).

59. Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971) *appeal dismissed for want of a substantial federal question,* 405 U.S. 950 (1972); Town of Vanden Broek v. Reitz, 53 Wis. 2d 87, 191 N.W.2d 913 (1971) *appeal dismissed for want of a substantial federal question,* 406 U.S. 902 (1972); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 319 A.2d 483 (1973) (constitutional to fire a secretary in a city office who refused to reside within the city); Town of Milton v. Civil Serv. Comm'n, 312 N.E.2d 188 (Mass. 1974) (preference given to those who had resided in city for one year when hiring policemen upheld); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 108 Cal. Rptr. 849 (1973) (discussed in text accompanying note 64 *infra*); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975) (continued residency in the city can be required of firemen).
60. *See* note 61 and accompanying text *infra.*
61. 385 Mich. 519, 190 N.W.2d 97 (1971).
62. The objective of the legislation was to promote good relationships with the public and provide a readily available reserve of officers in times of emergencies.
63. 405 U.S. 950 (1972).
64. *As quoted in* 385 Mich. 519 n.9, 190 N.W.2d 97 n.9 (1971).
65. 10 Cal. 3d 129, 514 P.2d 433, 108 Cal. Rptr. 849 (1973).

as required by the city charter, the California Supreme Court used the rational basis test and found the charter provision to be constitutional.[66] The court reasoned that the *Shapiro* line of cases did not apply because they were concerned only with durational residency requirements. In none of those cases had there ever been any debate on the issue of whether states could impose bona fide residency requirements before conferring certain benefits. The cases implied that it was permissible to deny medical aid, the right to vote, or welfare payments to nonresidents. The error the states had made was in denying these benefits to individuals who had recently become residents of these states.

Attaching the condition of continuous residence in a city to employment by that city can be viewed as a condition of bona fide residency. If, as implied by the *Shapiro* line of cases, a state does not violate the fundamental right of interstate travel when it denies welfare benefits, the right to vote, or emergency medical care to those who leave the state and are no longer residents of the state, it could not be successfully contended that a city violates the equal protection clause when it denies employment by the city to an individual who is not a resident of the city.

Thus, it would seem that even if there were a fundamental right of intrastate travel, that right would probably not be violated by a continuous residency requirement. Since there seems to be no support for the proposition that there is such a fundamental right, there is very little possibility of a successful constitutional attack on a continuous residency requirement.

B. Local Durational Residence

In addition to continuous residency requirements, local durational residency requirements are also likely to be contested. These arise when the local unit of government has as a pre-condition to voting, candidacy for public offices, or receiving welfare, public housing, or employment that the individual have lived in the locale for a specified period of time. Even the individual who had lived all of his life in the state could fail to meet this type of residency requirement because he had not lived in the local unit of government for the requisite time. Since there is little reason to believe that intrastate travel is a fundamental right, almost all local durational residency requirements would survive the low level constitutional attack to which they would be subjected. However, if the local durational residency requirement is applied to the new arrival from outside of the state, the right of interstate travel has been re-

66. The residency provision was overturned on other grounds.

stricted and the more stringent balancing of interests test, enunciated in *Sosna*, would be triggered. The Supreme Court in *Memorial Hospital v. Maricopa County*,[67] indicated that this was clearly the case. The Arizona requirement that an indigent be a resident of the county for one year before he was eligible for local medical assistance discriminated against newcomers to the state, as well as long-time residents who had not resided in a particular county for one year. The state attempted to justify the residency requirement as being only a burden on intrastate rather than interstate travel. The Court did not accept the argument and held that the residency requirement was a penalty on the right of interstate travel because the new arrival was denied the benefit because he had exercised the fundamental right of interstate travel.

The Court noted that arguing that the statute applied only to long-time state residents but not new arrivals might be inconsistent. It did not say that such an approach would be unconstitutional. Apparently, a local residency requirement would be measured by two different constitutional yardsticks depending upon the status of the challenger. If he were a recent arrival in the state, the right of interstate travel would be involved and the "stricter" *Sosna* test would be applied, with a good chance that the residency requirement would be invalid as applied to him. If the challenger were a long-time state resident, no fundamental right would be involved, the low level rational basis test would be employed, and the local durational residency requirement would almost certainly be upheld.

This difference in treatment between the long-time resident and the recent arrival is not inconsistent. The statute as applied to these two individuals is seeking to do two different things. In the case of the individual who is traveling interstate and exercising a fundamental right, the statute, if enforced would enfringe on the spirit of national unity. However, in the case of the long-time resident, the state has the right to enact reasonable legislation and enforce it, thereby preserving state autonomy.

Some local durational residency requirements, even as applied to long-time residents, may have to be measured by the strict scrutiny test[69] if they operate to deprive an individual of some funda-

67. 415 U.S. 250 (1974).
68. *Id.* at 256 n.9.
69. In Dunn v. Blumstein, the Court indicated that there were two independent reasons for applying the strict scrutiny test.

> In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that

mental right, such as voting. In this case, the durational residency requirement would be tested under strict scrutiny not because it infringed upon a fundamental right of intrastate travel, but because some other fundamental right would be involved.[70]

V. CONCLUSION

The Supreme Court is in agreement that there is a fundamental right of interstate travel. The Court is not sure what part of the Constitution embodies that right. The later cases suggest that the Court has given up the search and that the right of interstate travel is associated with the nature of the federal system.

In its latest right of interstate travel cases, the Court has moved away from the traditional two-tier equal protection analysis of statutes affecting the right to travel and adopted a balancing test which permits the competing federal values of limited local autonomy and national unity to be more finely adjusted.

There is very little support for the notion of a fundamental right of intrastate travel. Thus, most local residency requirements will be measured by the low level constitutional test and will probably be held to be valid.

Duane W. Schroeder '75

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the State must show a substantial and compelling reason for imposing durational residence requirements.

405 U.S. at 335.

70. Since the right to travel is not involved in this situation, discussion of it is best left to others. *See* Note, *Durational Residency Requirements for Candidates for State and Local Offices Violate Equal Protection*, 22 KAN. L. REV. 116, 116-19 (1973).